Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO: 74-1324

RONALD GENDRON,

Appellant,

-vs-

Honorable EDWARD H. LEVI, etc.; et al.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. .....

RONALD GENDRON,

Appellant,

vs.

HONORABLE EDWARD H. LEVI, Attorney General of the United States of America; HONORABLE RICHARD L. ROUDEBUSH, Administrator of Veterans Affairs of the United States of America; HONORABLE WESLEY G. HARDING, Chairman, Board of Veterans Appeals of the Veterans Administration of the United States of America,

Appellees.[1]

On Appeal from a United States District Court of Three Judges for the Central District of California

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JURISDICTIONAL STATEMENT

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[1]The public officers who were defendants at the time the complaint was filed have since been succeeeded by others. Pursuant to Rule 25(d)(1), FRCP, the present office holders have been substituted as appellees.

Appellant Ronald Gendron respectfully prays for plenary consideration of the questions presented, with briefs on the merits and oral argument.

OPINIONS BELOW

The opinion and judgment of the three-judge District Court for the Central District of California are not yet reported. They are reprinted at pages A-1 to A-20 of the Appendix. The opinion of the Court of Appeals for the Ninth Circuit, ordering the convening of a three-judge court and reversing dismissal of the action by District Court Judge Averv Crary, is reported at 501 F.2d 1087 (9th Cir. 1974), and is reprinted at pages A-21 to A-25 of the Appendix. Judge Crary's earlier opinion and judgment refusing to convene a three-judge court and dismissing the action are unreported and reprinted at pages A-26 to A-28 of the Appendix.

JURISDICTION

This suit was brought under 28 U.S.C. § 2282 and § 2284 for an interlocutory and permanent injunction restraining the

enforcement of an Act of Congress for repugnance to the Constitution of the United States. On August 7, 1974, the Court of Appeals for the Ninth Circuit ordered the convening of a three-judge court pursuant to those statutory provisions. The judgment of the three-judge District Court for the Central District of California (reprinted in Appendix A at pages A-17 to A-~~18~~ 20 was entered on January 30, 1975, and notice of appeal was filed with the clerk of the United States District Court for the Central District of California on February 19, 1975 (reprinted in Appendix B at page B-1). The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: Lynch v. Household Finance Co., 405 U.S. 538, 541 N. 5 (1972); Flast v. Cohen, 392 U.S. 83, 91 (1968); Schneider v. Smith, 390 U.S. 17 (1968).

STATUTES INVOLVED

38 U.S.C. §§ 211, 3401-3405 are set forth in Appendix C at pages C-1 to C-6.

QUESTIONS PRESENTED

1. Is there a deprivation of property within the meaning of the Due Process Clause of the Fifth Amendment to the Constitution of the United States when the Veterans Administration denies a disabled veteran's claim for disability benefits under 38 U.S.C. §§ 310-13?

2. Does 38 U.S.C. § 3404, which limits to $10.00 the fee a retained attorney may receive for consulting with a veteran, or for preparing, presenting, and prosecuting the claim of a veteran seeking disability benefits under laws administered by the Veterans Administration, deprive veterans of property without due process of law, because a veteran is entitled to the procedural protection of retained counsel in unreviewable proceedings before the Veterans Administration?

3. Does 38 U.S.C. § 3404, as described

above, deprive veterans of liberty without due process of law because the $10.00 fee limitation arbitrarily and capriciously prevents a veteran from availing himself of a statutorily granted right to retain counsel?

4. Does 38 U.S.C. § 3404, as described above, deprive veterans of equal protection of the laws as guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States, because applicants for benefits before other agencies of the United States Government are not similarly prevented by fee limitations from retaining counsel to assist them?

5. Did the District Court improperly refuse to receive evidence offered by appellant at the trial of his action, which evidence would have tended to prove that private veterans' organizations and their lay persons do not provide adequate representation at hearings of the Board of Veterans Appeals to review denials of applications for "service-connected" disability benefits?

STATEMENT OF THE CASE[2]

Appellant is disabled and a veteran. He was honorably discharged from the Air Force because he was found to be suffering from psychiatric problems; he now receives benefits under state and federal programs for aid to the disabled, which are not as extensive as veterans' disability benefits. His application for benefits under laws administered by the Veterans Administration for veterans with "service-connected" disabilities (38 U.S.C. §§ 310-13) was denied in January 1973 on grounds that his disability was not of the character which entitled him to disability benefits.

Appellant's disability precludes his representing himself in these administrative proceedings. The complexity of the statutes (38 U.S.C. §§ 310-13) and regulations (38 C.F.R., Parts 3 and 4) governing his entitlement to service-connected disability benefits caused him to conclude

[2]The material facts in the case are not in dispute, and appear in the stipulation entered into between the parties on November 14, 1974. (Clerk's Record [CR] 138-41.) Pursuant to Rule 12(1) of this Court, the record in the case was transmitted to this Court by the clerk of the Court below on March 5, 1975.

that the lay assistance made available to him without charge in 38 U.S.C. § 3402 would be inadequate in pursuing an administrative appeal. Appellant desired and continues to desire to be represented by an attorney. Significantly, if appellant cannot obtain an attorney for his administrative appeal, he will never receive the assistance of counsel in pursuing his claim, because 38 U.S.C. § 211(a) insulates the Veterans Administration's substantive benefits determinations from judicial review. Appellant attempted to retain an attorney to represent him in the hearing before the Veterans Administration Board of Veterans Appeals, provided for in 38 U.S.C. §§ 4001-4008. He was unsuccessful in his efforts, despite his willingness to pay a reasonable fee, because 38 U.S.C. §§ 3401-3405, taken together, limit to $10.00 the fee an attorney may be paid for preparing, presenting, and prosecuting a claim of this type. Although appellant contacted numerous attorneys, he was unable to locate one who would represent him for $10.00 or less.[3]

[3]Letters from lawyers were introduced as evidence pursuant to the stipulation entered into between the parties on November 14, 1974. (CR 20-25, 141; Stipulation 15.)

Appellant filed this action in the United States District Court for the Central District of California under 28 U.S.C. §§ 2282 and 2284, to enjoin enforcement of 38 U.S.C. §§ 3401-3405 because of their repugnance to the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The Veterans Administration agreed to delay appellant's hearing before the Board of Veterans Appeals until the resolution of this case. On November 2, 1973, Judge E. Avery Crary of the District Court denied appellant's motion to convene a three-judge court for want of a substantial federal question and granted appellees' motion to dismiss for failure to state a claim.

Both orders were reversed on appeal to the Court of Appeals for the Ninth Circuit. That Court held that the constitutional question was substantial because earlier decisions of this Court considering the constitutionality of the statutes involved had been decided under a different theory; namely, lawyers therein had claimed that the fee limitation interfered with their "freedom of contract." (Appx. A-24.) On remand, the Court below held the statutes

constitutional and dismissed the action. (Appx. A-19 to A-20.) The District Court found that appellant was not denied "property" within the meaning of the Due Process Clause of the Fifth Amendment when his application for service-connected disability benefits was denied, and hence the limitation on his right to retain counsel did not constitute a denial of procedural due process. Furthermore, it found that the denial was not a deprivation of "liberty" without due process because the statute was neither arbitrary nor capricious nor a denial of equal protection. In the course of the trial, the Court refused to permit appellant to introduce evidence which would have tended to prove that it was arbitrary and discriminatory for Congress effectively to limit appellant to lay assistance before the Board of Veterans Appeals, because such assistance is inadequate.[4] The Court deemed

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[4] Appellant attempted to submit proof at trial of the inadequacy and unavailability to certain kinds of veterans of the lay assistance which was available to others. He did so by proffering an offer of proof, but the Court rejected it. (Reporter's Transcript of November 25, 1974, at 26-28.) The affidavits so tendered but not accepted or otherwise added to the record are set out in Appendix D.

a Stipulation of Facts entered into between the parties on November 14, 1974, to be an exclusive statement of the facts, despite the absence of any agreement to that effect in the Stipulation or otherwise.[5]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions raised by this appeal touch the concerns of millions of veterans, servicemen, and potential military enlistees who have risked or may risk injury or disease while in the service of their country. If the District Court's decision in this case is not reversed, veterans will continue to be denied effective representation in pursuing claims for service-connected disability benefits before the Veterans Administration, under circumstances where they are completely denied judicial review. Disabled veterans will continue to be deprived of liberty and property without due process of law as this Court has defined those terms.

Remedying this situation would not require this Court to order administrative

[5] See footnote 4, p. 9, and R.T., id., at pp. 27-28.

hearings; such hearings are already authorized by statutes (38 U.S.C. §§ 4001-4008) and regulation (38 C.F.R. § 3.103). It would not require this Court to grant appellant a right to be represented by an attorney at such a hearing, since that right already exists as well, although now subject to a $10.00 fee limitation. Finally, it would not require this Court to order the government to provide lawyers free of charge to veterans, since appellant is merely seeking the right to retain counsel at a reasonable fee greater than the $10.00 maximum set by law. By denying appellant this relief, the District Court has effectively declared that Congress may grant a monopoly, in the representation of veterans, to the veterans' organizations, which are provided free working space in Veterans Administration buildings (38 U.S.C. § 3402), and have an ongoing relationship with the very administrators they must often oppose vigorously in behalf of their clients' interests. See Rabin, Preclusion of Judicial Review in the Processing of Veterans' Benefits: A Preliminary Analysis, 27 Stan. L. Rev. 905, 919 (1975). The District Court has sanctioned this "monopoly" even though

"the veterans organizations . . . experienced difficulty in establishing the same rapport with the younger veteran that they have long enjoyed with the older veterans," (M. Taussig, background paper for Those Who Served, Report of the Twentieth Century Fund Task Force on Policies Toward Veterans [1974] at 60, and even for complicated or subtle cases where the veteran may rightfully prefer and manifestly need a lawyer. Indeed, Veterans Administration officials testifying at Congressional hearings have conceded the need for lawyers in many disability appeals. (Testimony of A. T. Bronaugh, Assistant General Counsel, Veterans Administration; Hearings before the Sub-committee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 33-34 [1966].) The District Court's decision denying relief under these circumstances stems from a misapprehension of recent Supreme Court decisions defining the requirements of Due Process of Law.

I

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS ALREADY DETERMINED THAT THE QUESTION OF THE CONSTITUTIONALITY OF THE $10.00 FEE LIMITATION HAS NOT BEEN FORECLOSED BY PREVIOUS UNITED STATES SUPREME COURT DECISIONS.

The Court of Appeals for the Ninth Circuit found the questions raised by this action substantial when it reversed the District Court's order refusing to convene a three-judge court. Although this Court has, in the past, upheld the constitutionality of the statutes challenged in this action in Hines v. Lowry, 305 U.S. 85 (1938), and Margolin v. United States, 269 U.S. 93 (1925), it did so on the basis of a claim by attorneys that the $10.00 fee limitation for representation of veterans with disability claims interfered with their "freedom of contract." Since the instant action was brought instead by a recognized disabled veteran seeking to avail himself of more recently articulated rights of procedural due process in connection with denials of government benefits (see, e.g.,

Goldberg v. Kelly, 397 U.S. 254 [1970]) as well as the right to be free of arbitrary and discriminatory treatment in the distribution of such benefits (see, e.g., U. S. Department of Agriculture v. Murry, 413 U.S. 308 [1973]; Frontiero v. Richardson, 411 U.S. 677 [1971]), a different analysis was called for. On remand, however, the three-judge court misunderstood both the analysis mandated by recent decisions of this Court defining the types of interests that qualify as "property" within the meaning of the Due Process Clause, and decisions of this Court circumscribing the government's power to condition the exercise of statutory rights.

II

THE STATUTORY PROCEDURE RESULTING IN DENIAL OF SERVICE-CONNECTED DISABILITY BENEFITS DEPRIVES VETERANS OF PROPERTY EVEN THOUGH THEY SUFFER AN INITIAL DENIAL RATHER THAN A TERMINATION OF BENEFITS.

In deciding that appellant was not deprived of property when his claim for

service-connected disability benefits was rejected, the District Court correctly acknowledged the demise of the "right-privilege distinction" and the fact that property rights exist whenever there is a "legitimate claim of entitlement" (Board of Regents v. Roth, 408 U.S. 564 [1972]) to a statutory benefit. The District Court assumed incorrectly, however, that a "legitimate" claim exists only after benefits have once been granted. The District Court's reasoning dictates that a benefit can be denied initially without the procedural protections of due process; however, once granted, it cannot be terminated without those protections. This distinction is neither borne out by Supreme Court decisions, nor logically sound.

While some major decisions of this Court outlining the scope of procedural protection under the Due Process Clause have involved terminations rather than initial denials of benefits (e.g., Goldberg v. Kelly, supra), not all decisions have fitted this pattern. For example, one of the named plaintiffs in U. S. Department of Agriculture v. Murry, supra, was an initial

applicant for food stamp benefits. Nevertheless, he was deemed entitled to due process protection. The only United States District Court to consider the issue has deemed an initial denial of welfare benefits a deprivation of property. Barnett v. Lindsay, 319 F.Supp. 610 (D. Utah 1970). Analogously, applicants for licenses have been deemed entitled to procedural due process before the license-granting administrative body, not simply licensees whose licenses are about to be revoked. Dent v. West Virginia, 129 U.S. 114 (1889); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926). This Court's decision in Roth, supra, requires only a legitimate claim of entitlement, not a prior administrative determination of entitlement.

There is no reason to distinguish denials of benefits from terminations of benefits for purposes of determining the existence of "property." The individual's claim of entitlement and his expectations are derived from the same statutory eligibility provisions in both situations, and can be equally "legitimate." Goss v. Lopez, 43 U.S. Law Week 4181, 95 S.Ct. 729 (1975).

The circumstances of this case highlight the similarity. Appellant was discharged from the Air Force because of a disability and currently receives disability benefits from the state and federal government (which would be significantly supplemented by the veterans benefits he seeks). He is presumed by law to have been in sound condition upon entering military service. (38 U.S.C. § 311.) These facts are sufficient to raise expectations of entitlement to "service-connected" disability benefits equivalent to those of a veteran who has once been awarded such benefits. Appellant's expectations also have a basis in his enlistment contract which included the statutory law in effect at the time of his enlistment. See Goldstein v. Clifford, 290 F.Supp. 275 (D. N.J. 1968); cf. Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 435 (1934).

Not only is it incorrect to distinguish denials of benefits from terminations, but a constitutional right to due process upon termination of benefits would become meaningless if an agency could act arbitrarily in denying the benefits initially. Arguably, an applicant for benefits is entitled to different procedural protections from a

person whose benefits are being terminated, depending on such circumstances as the availability of judicial review after denial and the complexity of criteria for receipt of benefits. But the applicant should not be wholly without due process protection. Since in this case the criteria for eligibility require complex and subtle findings of fact, no judicial review is available, and the benefits involved are necessary to appellant's well-being, the procedural protections available in the hearing which is already authorized before the Board of Veterans Appeals should include the right to pay a retained attorney a reasonable fee. See Rabin, Preclusion of Judicial Review in the Processing of Veterans' Benefits; A Preliminary Analysis, 27 Stan. L. Rev. 905 (1975).

III

THE $10.00 FEE LIMITATION ON PAYMENT OF RETAINED COUNSEL IN VETERANS ADMINISTRATION PROCEEDINGS DEPRIVES VETERANS OF LIBERTY WITHOUT DUE PROCESS OF LAW BECAUSE IT ARBITRARILY AND

CAPRICIOUSLY RESTRICTS THE EXERCISE OF A STATUTORY RIGHT, AND INVIDIOUSLY DISCRIMINATES AGAINST VETERANS WITH DISABILITY CLAIMS.

Appellant is denied his liberty without due process of law if he is subjected to arbitrary and capricious limitations on exercise of his statutory rights, or he is subjected to invidious discrimination in the exercise of such rights. Griswold v. Connecticut, 381 U.S. 479 (1965); Frontiero v. Richardson, supra, 411 U.S. 677 (1971). Appellant has been the victim of both kinds of treatment.

A. There Is No Sound Reason For Allowing Veterans To Retain Attorneys But Denying Them The Ability To Pay Their Attorneys A Reasonable Fee.

A critical review of the reasons found persuasive by the District Court demonstrates this point, and reveals that the only rationale Congress had for limiting access to retained counsel is the impermissible desire to favor the veterans' organizations

with publicity, prestige, and power.

The District Court held, for example, that by providing for free lay assistance[6] and limiting fees payable to lawyers, Congress was acting reasonably to protect veterans against lawyers' fees that deplete the benefits awarded. Wholly apart from the question of the adequacy of such lay representation (an issue on which the District Court refused even to permit appellant Gendron to make an offer of proof [see fn. 4, supra, p. 9]), this reasoning overlooks the obvious fact that allowing veterans to pay retained lawyers a reasonable fee does not necessitate depriving veterans of the alternative of free lay representation. Appellant is simply contending that veterans should have the opportunity to make an informed choice between free lay representation and more costly professional representation in a complex case.

The additional argument that Congress acted reasonably because lawyers will delay

[6] See Stipulation 12 (CR 140) to the effect that the veterans and patriotic organizations do not provide attorneys but only lay representation.

proceedings by turning them into adversary hearings is not borne out by the statutory scheme. Lawyers are prohibited from accepting more than $10.00 for preparing as well as presenting a claim, and even for consultation with a veteran for advice of any kind. Furthermore, if lawyers' services result in lengthening the process because beneficial information is provided or inaccurate information questioned, it is difficult to see why Congress would want to limit their presence. Alternatively, if lawyers lengthen the hearings because they make unnecessary presentations, that behavior can be stopped by the Veterans Administration's exercising its statutory power to suspend or exclude from practice any attorney who is unprofessional, disreputable, or incompetent. 38 U.S.C. § 3404(b). While the $10.00 limitation on lawyers' fees now restrains the presentation by lawyers of unnecessary material, flexible exercise of a power to award "reasonable attorneys' fees" or a percentage of the benefits allowed would serve that purpose equally well without depriving most veterans of their choice of an attorney. Such a scheme

would have the added benefit of enabling lawyers to review and discourage claims they deem worthless in their professional judgment.

Finally, it is disingenuous for the government to profess a lack of necessity for lawyers in a "non-adversary" hearing process, when from the outset the government employs lawyers who make determinations as to the character of the discharge and of claimed disabilities. In addition, unlike the Selective Service system, which prohibits lawyers at its hearings (although it does allow lawyers to assist individuals in preparing claims),[7] members

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[7] While the Selective Service system may prohibit lawyers from directly representing registrants at personal appearance hearings (32 C.F.R. § 1624.1 [b] -- see, e.g., Nickerson v. United States, 391 F.2d 760 [10th Cir.], cert. den. 392 U.S. 907 [1968] upholding the regulation), lawyers are permitted to advise and counsel registrants at all other stages of their relationship with the Selective Service system. Cf. In re Verplank, 329 F.Supp. 433, 435-36 (C.D. Cal.), aff'd sub nom Weg v. United States, 450 F.2d 340 (9th Cir. 1971), cert. den. 409 U.S. 898 (1972). Such is not the case with the $10.00 fee limitation at issue here -- it absolutely prohibits an attorney from charging a veteran more than $10.00 for any work done in connection with that veteran's benefits

of the Veterans Administration hearing boards are often lawyers who represent the government.

In sum, none of the reasons offered by the government for restricting exercise of appellant's statutory right to retain counsel can withstand scrutiny. The only plausible explanation for the limitation is special Congressional favoritism to the politically powerful veterans' organizations. (Letter from Federick Davis to Hon. John Tunney, reprinted in Hearing before Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess. 520 [1973]; P. Starr, The Discarded Army: The Nader Report on Viet Nam Veterans and the Veterans Administration [1973] at 78.)

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controversy with the Veterans Administration, including consultations -- effectively prohibiting such consultations.

B. The District Court Acted Improperly In Rejecting Appellant's Claim That Congress Invidiously Discriminates Aginst Veterans Seeking Disability Benefits By Denying Them A Meaningful Opportunity To Retain Counsel.

This equal protection claim is based on the fact that in every other federal administrative proceeding where retention of counsel is authorized (see District of Columbia Bar Ass'n "Survey of Minimum Fees" [May 1969) 27, 28, listing reprinted at 16 Practical Lawyer [1970] 56-60), a fee is permitted which is not prohibitively small in every case.[8] The District Court's assertion that "the matters for which the fees are prescribed differ materially" from those involved in this case is simply incorrect. In Social Security disability hearings, where the issue of disability is identical, and the complex question of "service-relatedness" need not be raised, a twenty-five percent fee is allowed. 42 U.S.C. 406(a) and (b). While it may be argued that Congress feels veterans need more protection against overreaching lawyers than other groups of claimants, that argument is undercut by Congress's allowance for a ten percent attorney's fee in proceedings to claim veterans' life insurance benefits.

In sum, the District Court's decision incorrectly analyzed both the question whether a denial of service-connected disability benefits constitutes a denial of "property," and the question whether the $10.00 fee limitation is arbitrary, capricious, and invidious.

CONCLUSION

The questions presented are substantial and of great public importance; they should be accorded plenary consideration and decided by this Court.

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Attorneys for Appellant

[8] There are, of course, many agencies where there are no regulations or statutes at all vis-a-vis attorney fees, but to appellant's knowledge, no federal administrative agency prohibits an individual before it from retaining counsel.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RONALD GENDRON, Plaintiff, vs. Honorable WILLIAM B. SAXBE, Attorney General of the United States of America, et al., Defendants.	No. CV 73-2241-EC MEMORANDUM OPINION

The plaintiff seeks to enjoin the enforcement of Sections 3401-3405, Title 38, U.S.C., which limits the fees payable to agents and attorneys and provides for criminal sanctions for violation thereof. It is plaintiff's contention that the $10 fee limitation for agent or attorney imposed by § 3404 for the preparation, presentation and prosecution of claims under laws administered by the Veterans Administration, violates the plaintiff's constitutional rights to due process in the pursuit of his claim to service-connected disability benefits (38 U.S.C. § 301) and is a denial of his right to equal protection of the laws under the 5th Amendment.

The case was ordered remanded by the Court of Appeals, 501 F.2d 1087 (9th Cir., 1974), for hearing by a three-judge court following appeal from denial of plaintiff's request for a three-judge court and dismissal of the case on the grounds that the statute in issue and the predecessor statutes had been held to be constitutional by the Supreme Court in Hines vs. Lowrey, 305 U.S. 85 (1938), and Margolin vs. United States, 269 U.S. 93 (1925). The Court of Appeals observed in its opinion:

> "In holding that the issues are not insubstantial, we express no opinion on the ultimate merits of the constitutional arguments."

The Supreme Court, in the Margolin case, held that the statute in effect at that time, limiting fees to a claim agent or attorneys for services to a beneficiary in respect to a claim under the War Risk Insurance Act, was not in conflict with the 5th Amendment. Claimant's counsel was convicted for charging more than the authorized amount.

Hines vs. Lowrey, supra, involved the

World War Veterans' Act in effect in 1938 which limited to $10 the fee for any agent or attorney for services in the preparation of an application for veterans' benefits to the Bureau of Veterans' Affairs. The Supreme Court held that the limiting of the fee payable to an attorney for services in connection with the claim was a valid exercise of Congressional power. The veteran's counsel had received an award of $1500 for the services in question which involved preparation of the application for the claim and appearing with the disabled veteran in presenting the claim to the Bureau. The respondent was the representative of the estate of the incompetent veteran and sought to justify an award of $1500 attorney's fees made by a New York court. In upholding the limitation the Court said:

> "Congressional enactments in pursuance of constitutional authority are the supreme law of the land. Section 500 is a valid exercise of congressional power."

The Court of Appeals, Third Circuit,

ruled on the issue before that Court in Hoffmaster vs. Veterans Administration, 444 F.2d 192 (3rd Cir., 1971). The trial court, Chief Judge John W. Lord, Jr., denied the plaintiff veteran's motion for injunction and granted the motion of the Veterans' Administration to dismiss. After noting plaintiff's argument that the $10 limitation as to attorneys fees made it " * * * impossible for him to obtain proper legal counsel for his claims," the Court of Appeals ruled that the $10 limitation statute was enacted to protect just claimants from improvident bargains and "the constitutionality of this type of limitation has been upheld many times,' citing several authorities, including Hines vs. Lowrey and Margolin vs. United States, supra.

The constitutionality of the fee limitation to agents or attorneys in proceedings before the Veterans' Administration and of Section 211(a), Title 38, U.S.C., were before District Judge Kinneary in Holley vs. United States, 352 F.S. 175 (S.D. Ohio, 1972). Section 211(a) provides that no court of the United States shall have power or jurisdiction to review the decisions of the

Administrator of the Veterans' Administration. The claim of the plaintiff veteran was entitlement to a disability pension for service-connected disability. In denying the request for a three-judge court and dismissing the complaint, the Court observed with respect to the restriction of attorneys fees, " * * * such limitations on attorney's fees are clearly constitutional," citing the cases discussed hereinabove.

The parties, by their "Stipulation of Facts for Trial," have agreed, among other things, that the plaintiff enlisted in the United States Air Force about February 6, 1969. As the result of psychiatric evaluation conducted at the United States Air Force Hospital, Chanute Air Force Base, Illinois, about May 14, 1969, he was found to be suffering from psychiatric problems and was discharged from the Air Force under honorable conditions as "unsuitable" on June 20, 1969. It was further stipulated that after consideration of plaintiff's application for service-connected disability benefits and an examination of plaintiff in January, 1973, it was determined the plaintiff was not entitled to the benefits he was seeking. On May 3, 1973, the plaintiff

appealed the Veterans' Administration ruling and thereafter attempted to retain counsel but was unable to do so by reason of the $10 fee limitation. Plaintiff did not apply to the lay personnel referred to in Section 3402, Title 38, U.S.C. By reason of his mental condition plaintiff has received aid from the State of California and social security disability. He has, since March, 1973, been under the care of a psychiatrist whose services are paid for by Federal medicare.

Plaintiff relies chiefly on the decision of the Supreme Court of the United States in Goldberg vs. Kelly, 397 U.S. 254 (1970). There the appellees were receiving financial aid under the federally assisted New York State's Home Relief program. The issue involved was whether appellees' constitutional rights to due process were violated by termination of the aid being received, without prior notice and pre-termination evidentiary hearing. The Supreme Court held that such welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination. Pages 261-262.

In ruling that the appellees were entitled to pre-termination hearing, the Court said that the hearing need not be a judicial or quasi-judicial trial but the recipient must be advised of the grounds for termination and be given the opportunity to confront adverse witnesses and present his own argument and evidence orally before the decision maker. It was held that counsel need not be furnished at the hearing but the recipient of the benefits must be allowed to retain an attorney if he so desired. The Court, in ordering the pre-termination hearing, said:

"Thus the crucial factor in this context--a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended--is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." page 264.

That condition does not exist in the case at bar.

In reaching its conclusions in the Goldberg case, the Supreme Court applied a two part test, (a) is the interest at issue a constitutionally protected "property" or "liberty" interest, and if it is, (b) whether the recipient's interest in avoiding loss outweighs the Government's interest in maintaining the procedure as provided. Pages 262-263.

As to public assistance benefits, the Court states:

> "The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right".'" Page 262.

It then observes:

> "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation * * *."

Apparently, the Court was considering a "right" in terms of a property interest as

applying to withdrawal of an established right to public assistance benefits and not as a claim of qualification for such benefits manifested by an application therefor, as is involved in the instant case.

In Board of Regents vs. Roth, 408 U.S. 546 the respondent teacher had been hired for the term of one year and the issue, pertinent to the instant matter, was whether his procedural due process rights had been violated by the Regents refusing to rehire him without notice of the reasons therefor. The Court held that the terms of the respondent's employment accorded him no "property" interest protected by procedural due process. In discussing the property rights generally, the Court said:

> " * * * the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." Page 571.

At page 577 it is stated:

> "To have a property interest in

a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of the constitutional right to a hearing to prove an opportunity for a person to vindicate those claims."

It appears that the Court used "legitimate claim" and "claims" in the context of reference to a claim to benefits provided for by statute, the right to which had been determined, and as used in the opinion in the Goldberg case, supra, where the "claim" was to the continued payment of a benefit, the right to which had been established by the appellees and which benefit

they had been receiving. In the instant case, Congress has not deprived the veteran of a benefit once conferred without appropriate safeguards.

We conclude that the plaintiff herein has no property interest in an unproven claim or in the fact the statute provides for benefits to veterans who may be able to qualify therefor.

The recent opinion of the Supreme Court in Arnett vs. Kennedy, 416 U.S. 134, involved the claim of a non-probationary employee in civil service who was dismissed from a position in the Office of Economic Opportunity for allegedly recklessly false and defamatory statements about other OEO employees. He sued for injunction and declaratory relief on the grounds that the procedure provided in the Lloyd-LaFollette Act (5 U.S.C. § 7501) for removal of one of his status violated his constitutional right to procedural due process.

The Court held the post-termination hearings provided by the Civil Service Commission and the OEO were sufficient in the circumstances and that the appellee's due process rights had not been violated. In so holding, the plurality opinion states:

"Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause." Page 152.

The concurring justices are not in accord with that principle. However, in the case at bar where veterans benefits are involved Congress is cloaked with the finality of authority that should make the rule announced in the plurality opinion particularly applicable.

For over 100 years it has been recognited, in the field of veterans' affairs,

that Congress, through the Administrator of the Veterans' Administration, has had virtually complete latitude in authorizing and controlling the benefits to be granted veterans, the conditions under which granted and the procedure to be followed in the perfecting of an application for such benefits. Such long standing administration and control and the interpretation by the courts of the authority of the Veterans' Administration, as vested by Congress, should be entitled to substantial weight.

Congress has not been indifferent or insensitive to the needs or rights of veterans. In the statute's 112 year history, Congress has continuously considered and on many occasions has redetermined the fee policy here in question. As late as October, 1973, a subcommittee of the Senate Committee on the Judiciary considered the matter. Mr. John J. Corcoran, General Counsel of the Veterans' Administration, in his testimony before the Committee, reviewed the history of the Act and the fee limitations over the years. He said that the determination of claims is not an adversary proceeding and that there are

approximately 2800 lay persons throughout the Country experienced and fully familiar with every facet of veterans' laws and Veterans' Administration regulations and that most of them are full-time paid employees.

Mr. Corcoran points out the obvious inadequacy of the $10 fee for an attorney, particularly at the appellate level where issues of law may be involved, but he observes in the conclusion of his statement:

> "Nevertheless, in the interest of protecting the funds of the claimant, we believe there should be some limitation on the fee which might be charged.
>
> * * *
>
> "In summary, we do not believe that any problem exists in the vast majority of claims presented to the Veterans' Administration. In fact, we are confident that veterans and their dependents have available to them, without fee of any kind, expert assistance and representation."

Part II of the Report of the Senate subcommittee, pp. 456-459.

The full consideration given by the Committee to the payment of legal fees, in its hearings held September 19-20 and October 1-5, 1973, is evidenced by the Committee Reports, Parts I through IV, filed in the within case by defendants' counsel at the time of the oral argument on November 25, 1974.

Congress, having in mind the availability to veterans of experienced lay persons to represent them in applying and qualifying for benefits, along with the facilities provided by the Government, as set forth in Section 3402, Title 38, U.S.C., appears to have concluded tnat the provisions for the representation of veterans was quite adequate. More elaborate procedural requirements involving adversary hearing would make proceedings necessarily burdensome and lengthy to the end that there would be long delays to the detriment of the veterans, as well as the creation of a great drain on the funds provided for their comfort. Having in mind the effective measures it had taken for the representation

of veterans without charge, Congress could properly limit to a nominal sum the fee paid to one representing a veteran as an agent or attorney without prejudicing the veterans' rights.

This Court concludes the Congress, in the circumstances here involved, could have precluded attorney representation in these administrative proceedings, including appeal, without violating the veteran's constitutional rights to procedural due process. It would follow that the fee for any representation may be fixed although, from a practical standpoint, the fee of $10 is so small as to preclude the veteran from retaining a lawyer of his own choice who normally would require the payment of what would clearly be deemed to be a reasonable fee for the services of preparation, presentation and prosecution of a claim.

Congress, in its wisdom, having in mind all the facts and circumstances, has acted in what it deemed to be the best interest of veterans generally in imposing the fee limitation and not capriciously or arbitrarily or in violation of the veteran's constitutional rights.

The plaintiff also urges that the fee limitation is a denial of his right to equal protection of the laws, forbidden by the 5th Amendment. His position is based on the fact that other Federal agencies have many different fee schedules, which he lists, and he asserts that he, as a veteran, has been unreasonably classified. An examination of the examples plaintiff enumerates discloses that the matters for which the fees are prescribed differ materially from the one involved here. They afford no basis for comparison. There is no violation of equal protection.

For the reasons noted hereinabove and under the authorities which have upheld the challenged statutes, this Court concludes that no constitutional rights of the plaintiff to due process or equal protection under the 5th Amendment have been violated in the case at bar and that plaintiff's complaint should be dismissed.

The within Memorandum Opinion is to be deemed compliance with Rule 52, Federal Rules of Civil Procedure, as to Findings of Fact and Conclusions of Law, and counsel for the defendants is requested to prepare,

serve and lodge a proposed Judgment.

DATED: Jan 7 1975

/s/ M. Oliver Koelsch
United States Circuit Judge

/s/ E. Avery Crary
United States District Judge

/s/ Malcolm M. Lucas
United States District Judge

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division
CAROLYN M. REYNOLDS
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Los Angeles, California 90012
Telephone: (213) 688-2446

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RONALD GENDRON, Plaintiff, vs. HONORABLE WILLIAM B. SAXBE, Attorney General of the United States of America, et al., Defendants	)	Civil No. 73-2241-EC JUDGMENT

This matter came on for hearing on November 25, 1974, before a three-judge court, which was convened pursuant to 28 U.S.C. 2281, composed of the Honorable M. Oliver Koelsch, United States Circuit Court Judge, Honorable E. Avery Crary, United States District Judge, and Honorable Malcolm M. Lucas, United States District Judge; the

plaintiff was represented by Scott J. Tepper, Dennis H. Devermont, and Carole E. Goldberg, and the defendants were represented by William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief, Civil Division, Carolyn M. Reynolds, Assistant U. S. Attorney, by Carolyn M. Reynolds; and the Court having considered the Stipulation of Facts, the memoranda of the parties and all other pleadings herein; and having heard and considered the argument of the parties at the time of the hearing; and in accordance with its Memorandum Opinion filed herein on January 7, 1975,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of the defendants and dismissing plaintiff's action. Each party is to bear his own costs.

DATED: This 30 day of January, 1975.

/s/ M. Oliver Koelsch
/s/ E. Avery Crary
/s/ Malcolm M. Lucas

PRESENTED BY:

WILLIAM D. KELLER, United States Attorney
FREDERICK M. BROSIO, JR., Assistant U.S. Attorney, Chief, Civil Division

/s/ Carolyn M. Reynolds
CAROLYN M. REYNOLDS, Assistant U. S. Attorney
Attorneys for Defendants

APPROVED AS TO FORM AND CONTENT
/s/ Scott J. Tepper
SCOTT J. TEPPER, Attorney for Plaintiff

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD GENDRON, Plaintiff-Appellant vs. HONORABLE WILLIAM B. SAXBE, Attorney General of the United States of America; et al., Defendant-Appelles.	No. 73-3436 OPINION

Appeal from the United States District Court for the Central District of California

Before: BARNES, BROWNING, and HUFSTEDLER, Circuit Judges

HUFSTEDLER, Circuit Judge:

Gendron, a totally disabled veteran, brought suit challenging the constitutional validity of 38 U.S.C. § 3404, a statute that recognizes a veteran's right to the assistance of a lawyer to help him prepare and present to the Veterans' Administration claims for benefits, but limits to $10 the compensation that a lawyer can receive for his services.[1/] We hold that the complaint

[1/] In pertinent part section 3404 provides:

"(a) The Administrator may recognize any

presented questions that were not constitutionally insubstantial and, therefore, the district court erred in denying Gendron's motion to convene a three-judge court and in dismissing his complaint.

The following facts are drawn from the complaint and the affidavit annexed to it. Gendron had been found totally disabled by the State of California and by the Social Security Administration of the United States. He sought veterans' disability benefits claiming that his illness was service connected. Personnel of the Veterans' Administration thought otherwise; the Administration's

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individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration.

" . . .

"(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees--. . . (2) shall not exceed $10 with respect to any one claim.

38 U.S.C. 3405 imposes criminal penalties upon anyone who "directly or indirectly solicits, contracts for, charges, or receives . . . any fee or compensation except as provided in sections 3404 or 784 of this title."

Ratings Board rejected his claims stating that he "did not meet the schedular requirements for nonservice-connected pension benefits nor were his disabilities considered sufficient to permanently preclude some form of gainful employment." He tried to retain a lawyer to help him prepare his appeal to the Veterans' Administration Board of Veterans Appeals, but the search was in vain because he could find no lawyer who would take the case for $10.[2/]

The district court refused to convene a three-judge district court pursuant to 28 U.S.C. § 2281 because it concluded that Gendron's constitutional claim was insubstantial.

"'[C]laims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims doubtful or of questionable merit do not render them insubstantial for the purpose of 28 U.S.C. § 2281. A claim is insubstantial only if "'its unsoundness so clearly results from the previous decision of this court as to foreclose

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[2/] The appeal is still pending before the Board because the Government agreed to postpone the hearing until this suit is finally determined.

the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" Ex parte Poresky [(1933) 290 U.S. 30,] 32, quoting from Hannis Distilling Co. v. Baltimore [(1910) 216 U.S. 285], 288 . . . .'" (Hagans v. Lavine (1974) ___ U.S. ___, ___ [Slip opinion at 9], quoting from Goosby v. Osser (1973) 409 U.S. 512, 518.)

The constitutionality of federal legislation limiting the fees that veterans could pay lawyers for handling their claims against the Government has been before the Supreme Court twice, directly in Margolin v. United States (1925) 269 U.S. 93 and obliquely in Hines v. Lowrey (1938) 305 U.S. 85. In each case, the attack was launched on substantive due process grounds by lawyers seeking to sustain fees arranged by contract (Margolin) or by court award (Hines) in excess of the statutory limit. (Cf. Calhoun v. Massie (1920) 253 U.S. 170 (statute limiting lawyer's contingent fees for recovery of Civil War reparations upheld against substantive due process attack by lawyer).) The Supreme Court has never considered the questions whether the fee limitation of section 3404 deprives the veteran of his statutorily

recognized right to counsel, or deprives him of equal protection or of procedural due process, the basis of Gendron's constitutional assault. Here, as in Mengelkoch v. Industrial Welfare Commission (9th Cir. 1971) 442 F.2d 1119, prior decisions upholding the statute were directed to constitutional issues different from those raised in the subsequent action, and, therefore, the earlier decisions do not render the new issues constitutionally insubstantial for section 2281 purposes.

In the light of Goldberg v. Kelly (1970) 397 U.S. 254 and its progeny and recent cases defining and refining the reach of equal protection, these issues are not frivolous. In holding that the issues are not insubstantial, we express no opinion on the ultimate merits of the constitutional arguments.

Reversed and remanded for further proceedings consistent with the views herein expressed.

[Names of attorneys and address omitted]

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RONALD GENDRON, Plaintiff, vs. HONORABLE ELLIOT L. RICHARDSON, Attorney General of the United States of America, et al.	Civil No. 73-2241-EC ORDER (1) DENYING APPLICATION FOR THREE-JUDGE COURT, AND (2) DISMISSING ACTION

The above-entitled matter came on regularly for hearing on plaintiff's application to convene a three-judge court, and on defendants' Motion to Dismiss before the Honorable E. Avery Crary, United States District Judge, on October 26, 1973, the plaintiff appearing through his counsel, Dennis H. Devermont, A. L. Wirin, & Fred Okrand, by Scott J. Tepper, and the defendants appearing through their counsel, William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant U.S. Attorney, by Carolyn M. Reynolds, and the Court having considered the pleadings filed herein, the memoranda filed by the parties, and the oral argument at the time

of the hearing, and the Court finding that the constitutionality of the fee limitation in 38 U.S.C. 3404 et seq., and the predecessor statutes, have been upheld in Hines v. Lowrey, 305 U.S. 95 (1938); Margolin v. U. S., 269 U.S. 93 (19250; and Hoffmaster v. Veterans Administration, 315 F. Supp. 62 (E.D. Penn. 1970), aff'd 444 F.2d 192 (3rd Cir. 1971); and, therefore, that this action does not present a substantial constitutional issue, (Gostovich v. Valore, 153 F. Supp. 826 (W.D. Penn. 1957), appeal dism'd 355 U.S. 608 (1958), wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's application to convene a three-judge court be, and the same is hereby, denied; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants' Motion to Dismiss be, and the same is hereby, granted upon the ground that the Complaint fails to state a claim upon which relief can be granted.

DATED: This 1st day of November, 1973.

/s/ E. AVERY CRARY
UNITED STATES DISTRICT JUDGE

Presented by:

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division
/s/ Carolyn M. Reynolds
CAROLYN M. REYNOLDS
Assistant U. S. Attorney

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption omitted] Civil No. 73-2241-EC

JUDGMENT OF
DISMISSAL

Defendants' Motion to Dismiss this action came on for hearing before this Court on October 26, 1973, before the Honorable E. Avery Crary, United States District Judge, presiding, and the contentions and issues of the parties being duly considered, and in accordance with the Order of this Court filed November 1, 1973,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the plaintiff's action be dismissed, each party to bear his own costs.

DATED: This 7th day of May, 1974, NUNC PRO TUNC to November 2, 1973.

/s/ E. AVERY CRARY
UNITED STATES DISTRICT JUDGE

APPENDIX-B

APPENDIX B

[Names omitted]
Attorneys for Plaintiff

Filed
Feb 19 10 11 AM '75
Clerk, U.S. Dist.Ct.
Cent. Dist. of Calif.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RONALD GENDRON, Plaintiff, -vs.- Honorable EDWARD H. LEVI, Attorney General of the United States; et al., Defendants.	CV 73-2241-EC NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that RONALD GENDRON, Plaintiff herein, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint, entered herein on January 30, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: February 14, 1975.

Respectfully submitted,

SCOTT J. TEPPER
CAROLE E. GOLDBERG
DENNIS H. DEVERMONT
A.L. WIRIN
FRED OKRAND

By *Scott J. Tepper*
SCOTT J. TEPPER

Attorneys for Plaintiff

[PROOF OF SERVICE OMITTED]

APPENDIX-C

APPENDIX C

TITLE 38, UNITED STATES CODE

§ 3401. Prohibition against acting as claims agent or attorney

Except as provided by section 500 of title 5, no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Veterans' Administration unless he has been recognized for such purposes by the Administrator.

83 Stat. 34.

§ 3402. Recognition of representatives of organizations

(a) (1) The Administrator may recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as he may approve in the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration.

(2) The Administrator may, in his discretion, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations

so recognized.

(b) No individual shall be recognized under this section--

(1) unless he has certified to the Administrator that no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim; and

(2) unless, with respect to each claim, such individual has filed with the Administrator a power of attorney, executed in such manner and form as the Administrator may prescribe.

(c) Service rendered in connection with any such claim, while not on active duty, by any retired officer, warrant officer, or enlisted man of the Armed Forces recognized under this section shall not be a violation of sections 203, 205, 206, or 207 of title 18.

72 Stat. 1238, 83 Stat. 34.

§ 3403. Recognition with respect to particular claims

The Administrator may recognize any individual for the preparation, presentation, and prosecution of any particular claim for

benefits under any of the laws administered by the Veterans' Administration if--

(1) such individual has certified to the Administrator that no fee or compensation of any nature will be charged any individual for services rendered in connection with such claim; and

(2) such individual has filed with the Administrator a power of attorney, executed in such manner and in such form as the Administrator may prescribe.

72 Stat. 1238.

§ 3404. Recognition of agents and attorneys generally

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney--

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees--

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed $10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed.

72 Stat. 1238.

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

72 Stat. 1239.

§ 211. Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

(b) The Administrator may require the opinion of the Attorney General on any question of law arising in the administration of the Veterans' Administration.

79 Stat. 886, 80 Stat. 24,
84 Stat. 790.

APPENDIX-D

APPENDIX D

AFFIDAVIT OF PATRICK J. WOOD

County of Los Angeles)
State of California) ss

PATRICK J. WOOD, being first duly sworn, does hereby depose and say as follows:

1. I make this affidavit in support of the Plaintiff in the case of GENDRON v. SAXBE, CV 73-2241-EAC-CD (C.D. Calif.).

2. I am the co-ordinator of the Los Angeles County Veterans' Out-Reach Program located in Venice, California; this program is funded by Los Angeles County and is a program which deals with veterans' problems, including matters such as those presented by Plaintiff GENDRON in this case, viz: benefits problems and appeals through the administrative appellate system of the VA.

3. In my position as co-ordinator for the last 11 months, I am often contacted by veterans with benefits appeals matters. I have been required to refer all of these matters to traditional veterans organiza-

tions such as the American Legion, the Jewish War Veterans of the United States, and the Veterans of Foreign Wars since there are no attorneys in the greater Los Angeles area, to my knowledge, who practice in this area of the law and would be willing and/or able to accept remuneration for any work, from consultation to appeal, for the maximum fee permitted of $10. I have often followed up the work done in the cases which I have referred to the veterans groups, and I have formed an opinion, based upon my experience as Director of the Veterans' Out-Reach Program, and as a second-year law student, and after reviewing the referred veteran's files and the work done for him by the lay representatives who handle these benefits denial appeals, that the representation given is often incompetent, and is usually incompetent in cases presenting complex facts or issues of law, or mixed issues of fact and law.

4. I do not believe that there is any ulterior motive or purpose in the fact that most of the representation supplied by lay

members of the traditional veterans' organizations is incompetent; rather, it would appear to me that the following factors are involved:

(a) lack of knowledge, by the lay representatives, of the substantive laws pertinent to a decision in a particular area;

(b) failure to understand the manner in which a case should be presented, and the decision appealed from sought to be overturned;

(c) lack of training or any expertise in the area of legal-medico matters.

Additionally, it should be mentioned that the lay representatives about whom I here speak do have a very thorough understanding of the <u>procedures</u> involved in the appeal of a benefits denial, but that once <u>at</u> the appeal, the lay representative is at a loss as to <u>what</u> should be done.

5. I believe that the $10 fee limitation is the substantial bar to veterans such as those I have counselled receiving adequate legal representation.

I swear that the matters above are true and correct of my own knowledge, or to the best of my knowledge and belief.

/s/ Patrick J. Wood
PATRICK J. WOOD

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 25th DAY
OF NOVEMBER 1974.

/s/ Ruby L. Pope
Notary Public in and for
said County and State

[NOTARIAL SEAL OMITTED]

AFFIDAVIT OF THOMAS S. AMBROSE

County of Los Angeles)
State of California) ss

I, THOMAS S. AMBROSE, being first duly sworn; so hereby depose and say as follows:

1. I make this affidavit in support of the Plaintiff in the case of Gendron v. Saxbe, CV 73-2241 (C.D. Calif.);

2. I am the Outreach Co-ordinator of the Office of Veterans Affairs located at California State College, Dominguez Hills. This program is federally funded through the Veterans Cost of Instruction Program and deals with veterans returning to institutions of higher learning. A good portion of our responsibility includes veterans benefits claims and appeals to the Veterans Administration.

3. It has been my experience, while soliciting representation from such veteran service organizations as The Red Cross, The American Legion, and the Veterans of Foreign Wars, to have encountered distinctly racist and prejudicial attitudes among several of the service officers representing these groups. I found a general

reluctance to provide the advocacy necessary to help disadvantaged minority veterans with valid claims against the Veterans Administration. The attitudes expressed were that these veterans had abused their privileges, and had already struck out, even before having their claims reviewed by the Veterans Administration. The service officers had not talked to any of the veterans, they had merely looked at the veterans records.

4. I feel that veterans are being done a disservice by the incompetency of such veteran service officers. Veterans would be far better served if they had the availability of a lawyer of their choice. I further believe that veterans are denied competent counsel by placing a $10 limit on the payment for services of a lawyer who represents a veteran with his claim.

/s/ Thomas S. Ambrose
THOMAS S. AMBROSE

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 25th DAY
OF NOVEMBER 1974

/s/ Patrick J. Wood

[NOTARIAL SEAL
OMITTED]

CERTIFICATE OF SERVICE

I, Fred Okrand, certify as follows:

I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and am one of the attorneys for plaintiff-appellant herein.

On April 17, 1975, I served the within JURISDICTIONAL STATEMENT on defendants-appellees herein by placing three copies thereof enclosed in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I further certify that all parties required to be served have been served.

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Supreme Court, U. S.
FILED
JUN 13 1975
MICHAEL RODAK, JR., CLERK

No. 74-1324

In the Supreme Court of the United States

OCTOBER TERM, 1974

RONALD GENDRON, APPELLANT

v.

EDWARD H. LEVI,
ATTORNEY GENERAL OF THE UNITED
STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
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Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees move to affirm the judgment of the district court.

STATEMENT

Appellant enlisted in the Air Force in February, 1969. Four months later—in June, 1969—he was honorably discharged on the ground that he was suffering from psychiatric problems. He applied to the Veterans Administration for disability benefits pursuant to 38 U.S.C. 310-313, which authorize the payment of such benefits when the disability is "service-connected". After consideration of appellant's application and the results of a physical examination, his claim was denied.

Appellant appealed to the Board of Veterans Appeals. He was unable to retain counsel to represent him before the Board because, under 38 U.S.C. 3404(c), attorneys' fees in veterans' benefit cases are limited to $10.[1] Appellant did not attempt to utilize the services of lay personnel, who are representatives of various veterans and patriotic organizations authorized by statute (38 U.S.C. 3402) to provide free assistance to veterans in processing their claims.

Appellant then instituted this suit in the district court to enjoin the operation of the $10 statutory fee limitation, contending that the statute deprived him of liberty and property without due process of law in violation of the Fifth Amendment of the Constitution. The district court, holding that the question presented had been fully resolved by prior decisions of this Court, declined to convene a three-judge district court, and dismissed appellant's complaint (J.S. App. A-26 to A-27). The court of appeals reversed (J.S. App. A-21 to A-25), finding that the complaint presented a substantial constitutional question,[2] and ordered that the case be heard by a three-judge district court pursuant to 28 U.S.C. 2282. Such a court was duly convened and sustained the constitutionality of the challenged statute (J.S. App. A-1 to A-18).

ARGUMENT

The district court correctly held that the fee limitation prescribed by 38 U.S.C. 3404(c) does not constitute a violation of the Due Process Clause. For over a hundred

[1]Section 3404(c) establishes the monetary limit, and Section 3405 (1) prescribes criminal penalties for the receipt of sums in excess of that limitation. The pertinent statutes are set forth in Appendix C to the Jurisdictional Statement, pp. C-1 to C-5.

[2]The court of appeals, however, intimated no view concerning the merits of the case (J.S. App. A-25).

years, Congress has, by statute, established a limitation upon the amount of attorneys fees chargeable for services rendered in connection with claims for veterans benefits.[3] The constitutional validity of the current legislation, or predecessor statutes imposing a lesser fee than that presently fixed by Congress, has been sustained by every court that has considered the question, including this Court.[4] See *Margolin* v. *United States*, 269 U.S. 93; *Hines* v. *Lowrey*, 305 U.S. 85; *Bodey* v. *United States*, 495 F. 2d 1370 (C.A. 4), certiorari denied, 419 U.S. 899; *Hoffmaster* v. *Veterans Administration*, 444 F. 2d 192

[3]Efforts by the Congress to protect the veteran date from the nation's beginnings. Shortly after the adoption of the Constitution, Congress prohibited the "sale, transfer or mortgage * * * of the pension * * * [of a] soldier * * *, before the same shall become due * * *." 1 Stat. 45. The first restriction upon fees was established in 1862, when, during the Civil War, abuses committed by claims agents and the simplicity of adminisrative procedures for asserting claims, prompted Congress to enact a pension bill limiting fees to $5 for presentation of a claim. 12 Stat. 568. Throughout many of the subsequent versions of the statute, the retention of the fee limitation was in part based upon contemporary evidence of exploitation of veterans by claims agents. See *Limitations on Attorneys' Fees Under Federal Law*, American Bar Foundation, pp. 19-21 (May 1961). An historical enumeration of the statutes containing the fee limitation is contained in the Appendix to this motion.

[4]This Court has never considered the precise question presented by appellant, rather its prior decisions (*Margolin* v. *United States*, *supra*, and *Hines* v. *Lowrey*, *supra*) have sustained the fee limitation against challenges to Congress' substantive constitutional power to enact such limitations. Procedural due process claims regarding the fee limitation have, however, been uniformly rejected by the other federal and state decisions cited above. And, as shown at pp. 7-9, *infra*, we submit that (1) appellant's claim to benefits does not implicate the procedural requirements of the due process clause, and (2) even assuming that it does, his attack on the fee limitation is without merit.

(C.A. 3); *Holley* v. *United States*, 352 F. Supp. 175 (S.D. Ohio), affirmed, 477 F. 2d 600 (C.A. 6), certiorari denied, 414 U.S. 1023; *Gostovich* v. *Valore*, 153 F. Supp. 826 (W.D. Pa.), appeal dismissed, 355 U.S. 608; *In re Guardianship of Copsey's Estate*, 10 Cal. 2d 748, 76 P. 2d 691 (Sup. Ct.), certiorari denied, 304 U.S. 574; *In re Descamp's Estate*, 405 Pa. 331, 175 A. 2d 827 (Sup. Ct.). The constitutional power of Congress to limit the amount of attorneys' fees chargeable for the prosecution of claims against the government rests upon its unquestioned authority to protect the public fisc and to assure that governmental benefits are received, without substantial depletion, by the beneficiary for whom they are intended. As this Court, per Brandeis, J., stated in *Calhoun* v. *Massie*, 253 U.S. 170, 174 (relied upon in *Margolin* v. *United States*, *supra*):

> By the enactment, from time to time, of laws prohibiting the assignment of claims and placing limitations upon the fees properly chargeable for services Congress has sought both to prevent the stirring up of unjust claims against the Government and to reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage. The constitutionality of such legislation, although resembling in its nature the exercise of the police power, has long been settled.* * * [Footnote and citations omitted.]

In lieu of attorneys' services, Congress has made provison for supplying, without charge, expert lay assistance to the veteran in preparing and presenting his claim. Thus, under 38 U.S.C. 3402, Congress has authorized the administrator of the Veterans Administration to recognize certain veterans and patriotic organizations, and

such others as he may approve, to provide the veteran with free assistance at every stage of the claims process.[5] These organizations employ, on a full-time basis, approximately 2,800 paid individuals who are "familiar with every facet of veterans' laws and VA regulations" to assist the veteran in pressing his claim. Testimony of John J. Corcoran, General Counsel, Veterans Administration, Hearings on the Effect of Legal Fees on the Adequacy of Representation before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee, 93d Cong., 1st Sess., p. 457 (1973)(hereinafter "Hearings").[6] Additional assistance is available

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[5]Organizations expressly named by statute are the Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, and the Veterans of Foreign Wars. 38 U.S.C. 3402(a)(1); J.S. App. C-1. Congress has also authorized the Administrator to provide space and office facilities, if available, for "the use of paid full-time representatives of national organizations so recognized." 38 U.S.C. 3402(a)(2); J.S. App. C-1 to C-2.

[6] * * * Most of the recognized veterans' organizations, and most of the States, work with claimants in the preparation, presentation, and prosecution of claims for benefits. These organizations maintain a staff of employees—well trained and experienced—who devote their full-time efforts to assisting veterans and other claimants on a strictly no-charge basis. These men and women are accredited as representatives of the organizations to the Veterans Administration and are accorded every permissible assistance by our personnel, including the right to inspect the individual veteran's claims folder under the authority of the veteran's power of attorney, filed with the VA. These representatives functon not only at the Regional Offices and field stations but also here in Washington at the Central Office and before the Board of Veterans Appeals, both here and in the field. [Hearings, *supra*, at 457.]

through the VA itself and neighborhood veterans' organization where individuals, designated as "Service Officers," utilize their expertise on behalf of the claimant.[7]

These services that are available to veterans[8] without cost are more than sufficient to effectively advance his claim when considered in the context of the VA claims process. First, in the vast majority of cases, the claim involves no serious controversy, and the matter can easily be resolved by the submission of a simple claims form, based upon information readily available in VA files or in the records of the Armed Forces (Hearings, *supra*, at 458). Second, claims determinations made by the VA are "nonadversary proceedings" (38 C.F.R. 19.133(c); see also 38 C.F.R. 3.103(a)). They are *ex parte* in character, where the claimant (or his representative) is provided with a full opportunity to present his case, and faces no antagonist. The Veterans Administration, when conducting hearings to determine the merits of the veteran's claim, is charged with "the obligation * * * to assist claimant in developing the facts pertinent to his claim" (38 C.F.R. 3.103(a)), and "to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position" (38 C.F.R. 3.103(c)). Questions directed to the claimant are "to be framed to explore fully the basis for the claimed entitlement rather than with an intent to refute evidence and to discredit testimony" (*ibid.*).

One such source, on the local level, is the neighborhood veterans' organization. We find in almost every local post or chapter of the national veterans' organizations a person designated as Service Officer or some similar title. While these individuals may be lacking in formal legal training, they have a wealth of experience coupled with a keen desire to be of help to their fellow veterans. They possess a working knowledge of the basic benefits available and a familiarity with the claim forms used and the initial steps necessary to bring a claim properly before the Veterans Administration at the Regional Office. [Hearings, *supra*, at 457.]

[8]The appellant made no attempt to avail himself of these gratuitous services (J.S. App. A-6).

The veteran, therefore, is entitled not only to the services, without cost, of a skilled lay representative at every stage of the proceedings before the VA (38 C.F.R. 3.103(d)), but also receives the assistance of the VA personnel who are charged with determining the validity of his claim in a nonadversary context. Under these circumstances, there is ample warrant to conclude, as Congress evidently has done, that the existing procedures generally provide a veteran with adequate representation at no charge and without any depletion in the amount of benefits awarded to him.

Thus, even assuming that appellant's unproven claim to benefits constitutes "property" subject to the due process clause of the Fifth Amendment (but see pp. 8-9, *infra*), the fee limitation is constitutionally valid. Under the balancing of interests test that is appropriate in a due process inquiry (*Morrissey* v. *Brewer*, 408 U.S. 471, 482-484), we submit that appellant's desire to be represented by counsel is outweighed by the competing governmental interest in preserving benefits undepleted by legal fees. That interest is entitled to particular weight in this case, where, as noted earlier (pp. 4-6, *supra*), Congress has provided a system of free assistance to claimants, and where claims are determined in nonadversary proceedings. There is, therefore, no occasion to disturb the long-standing congressional policy to limit the fees chargeable by attorneys in prosecuting claims for veterans' benefits.[9]

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[9]To be sure, there will be instances where the services of an attorney would be of significant assistance and the veteran will nonetheless be precluded by the statutory fee limitation from obtaining counsel. But it is for Congress to determine whether these instances are sufficiently frequent to warrant the sacrifice of the legitimate interests furthered by the current statutory policy to limit fees. Congress has continually examined the question, both in hearings on the matter (see Hearings, *supra*), and in the consideration of legislation to abolish or modify the existing limitation. In the last decade, numerous bills to alter the limitation have been introduced, but none has been enacted.

2. As the foregoing discussion demonstrates, the statutory fee limitation represents a legitimate and reasonable exercise of congressional power, and thus does not offend the Constitution. However, while reaching this same conclusion, the district court also ruled (J.S. App. A-6 to A-12) that the appellant had failed to advance a sufficient "property" or "liberty" interest to invoke the Fifth Amendment. See *Board of Regents* v. *Roth*, 408 U.S. 564. This alternative basis for the decision below is also correct.

The appellant's alleged property interest consists solely of his unproven claim to benefits and his asserted expectation that he is entitled to those benefits under the law (J.S. 14-18). However, as this Court has held:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. [*Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577.]

An unproven claim to benefits constitutes no more than a "unilateral expectation" of entitlement, lacking the substantiality of claims which have been adjudicated in the claimant's favor, and which serve as the basis of his expectation that the benefits sought are his property. The decisions of this Court make plain that only an established claim to benefits, the right to which has been determined, attains the status of property for purposes of constitutional adjudication. See *Goldberg* v. *Kelly*, 397 U.S. 254 (termination of claimant's pre-existing right to welfare benefits); *Perry* v. *Sindermann*, 408 U.S. 593 (termination of employment status); *Goss* v. *Lopez*, No. 73-898, decided January 22, 1975 (suspension of enrolled students); *Fuentes* v. *Shevin*, 407 U.S. 67 (seizure of claimant's personal property). See also *Board of Regents* v. *Roth*, 408 U.S. 564 (no property interest in continued

employment when no basis for such an expectation). The due process clause applies only to previously established claims because its purpose is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577. As there can be no legitimate reliance upon a claim that has not been determined to be valid, the district court properly held that the appellant had no property interest sufficient to invoke the Fifth Amendment.[10]

CONCLUSION

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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JUNE 1975.

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[10]The district court also properly rejected appellant's contention that the fee limitation invidiously discriminates against veterans by imposing a lesser fee than Congress has provided in other benefit programs. As the district court observed (J.S. App. A-17), "the matter for which the fees are prescribed differ materially" from those involved here. For example, while, as appellant points out (J.S. 24-25), the Social Security Act permits the payment of a twenty-five percent attorneys' fee (42 U.S.C. 406(a) and (b)) in disability cases, the claimant in such cases is not afforded the benefit of free lay representation and the claims process is frequently more complicated than in veterans' cases. Thus, the programs to which appellant adverts in making his constitutional argument are not alike, and are based upon entirely different considerations than those presented here.

APPENDIX

History of the Agent and Attorney Fee Limitation with Respect to Veterans Benefit Claims

(a) As early as July 14, 1862, Congress limited the fees of agents or attorneys who assisted a claimant in establishing a claim for a pension, bounty or other allowance before the Pension Office (12 Stat. 566). The basic fee authorized was $5.00, with additional small amounts authorized under certain conditions.

(b) This 1862 Act was amended in 1868, raising the authorized fee to $10.00 (13 Stat. 387).

(c) In 1866, a Joint Resolution was adopted involving, "Bounties to Colored Soldiers, and the Pensions, Bounties and Allowances to their Heirs". It contained an agent or attorney fee limitation which ranged from $5.00 to $10.00, depending upon the amount of the claim collected (14 Stat. 367).

(d) The fee limitation applicable to claims for pensions or bounty land, was again changed in 1870 to provide that a fee up to $25.00 could be authorized upon approval by the Commissioner of Pensions. No fee in excess of $10.00, however, could be paid without such approval (16 Stat. 193).

(e) The 1870 provision was repeated in the Pension Law consolidation of 1873 (17 Stat. 586).

(f) In 1878, this fee limitation was changed in pension cases to again limit the authorized fee to $10.00 (20 Stat. 243).

(g) The 1878 Act was repealed in 1884 and Congress again reverted to the $10.00 to $25.00 fee limitation (23 Stat. 98).

(h) In 1890, pensions were granted to soldiers and sailors who were incapacitated for the performance of manual labor, and the Act granting such pensions limited the agent or attorney fees for assisting a claimant under that Act to $10.00 (26 Stat. 182).

(i) In 1892, an Act granting pensions to Army nurses prohibited the payment of any agent or attorney fee (27 Stat. 348). Similar prohibitions were contained in a 1901 Act relating to pensions to remarried widows (31 Stat. 1445), and a 1907 Act granting pensions to certain enlisted men, soldiers and officers, who served in the Civil War and the War with Mexico (34 Stat. 879).

(j) In 1912 and 1916, Acts increasing certain pension benefits included a prohibition against the payment of any agent or attorney fees except where an original claim was involved, and then such fee was limited to $10.00 (37 Stat. 112 and 39 Stat. 844).

(k) In 1917, a 1914 Act establishing the War Risk Insurance Program was amended by providing a new section limiting agent and attorney fees to litigated cases, and even then restricting the fee to 10% of the amount recovered. No fees were authorized unless litigation was involved (40 Stat. 102).

(l) This Act was amended in 1918 and agent and attorney fees were authorized in non-litigated cases up to $3.00 for assisting in preparing necessary claim papers (40 Stat. 555).

(m) In 1918, pensions were granted to widows and minor children of officers and enlisted men who served in the War with Spain, the Philippine Insurrection, or in China. Fees were limited to $10.00 (49 Stat. 903).

(n) Pension benefits were extended to soldiers and sailors of the conflicts listed in subparagraph (m) in 1920 and an agent or attorney fee of up to $20.00 was authorized where the agent or attorney assisted in processing the claim (41 Stat. 982).

(o) In 1922, pension benefits as a result of service set forth in subparagraph (m) were extended to certain new classes of individuals. Agent or attorney fees were limited, however, to those cases involving original claims for pensions, and then not to exceed $10.00 (42 Stat. 834).

(p) In 1924, an Act providing adjusted compensation to veterans of the World War prohibited the payment of any agent or attorney fees (43 Stat. 121).

(q) Also in 1924, laws granting compensation, pension, disability allowance and other similar benefits were repealed and the benefits provided thereby were consolidated into a new World War Veterans' Act. Agent or attorney fees were limited to $10.00 for assistance in the preparation of a claim, and to 5% of the amount recovered in litigated insurance cases (43 Stat. 607).

(r) This Act was amended in 1925 to increase the amount of the agent or attorney fees authorized in litigated insurance cases from 5% to 10% of the amount recovered (43 Stat. 1302).

(s) In 1926, pensions were granted and increased to certain soldiers, sailors, and marines (and their widows) of the Civil and Mexican Wars, and to widows of the War of 1812, and to Army nurses. Attorney fees were limited to $10.00 for assistance in filing original claims (44 Stat. 206).

(t) In 1926, an Act amending the World War Adjustment Compensation Act prohibited the payment of any attorney fee (44 Stat. 826).

(u) Pension benefits were extended or increased again in 1927 to certain soldiers who served in the Indian Wars from 1817 to 1898. A $10.00 fee limitation (applicable to original claims only) was included (44 Stat. 1361).

(v) In 1928, an Act granting pensions and increase of pensions to widows and former widows of Civil War veterans prohibited to payment of any attorney fee (45 Stat. 714).

(w) Pensions were again increased or extended in 1930 to certain soldiers, sailors and nurses of the War of Spain, the Philippine Insurrection or the Chinese Relief Expedition. Agent or attorney fees were limited to $10.00 for original claims (46 Stat. 492). Another 1930 Act increasing pensions as a result of Civil War service contained a similar provision (46 Stat. 529).

(x) As a result of the Consolidation Act of 1930, the Pension Bureau, United Veterans Bureau and the National Homes for Disabled Volunteer Soldiers were merged into the Veterans Administration. No change was made with respect to the various provisions then in effect involving agent or attorney fee limitations. In 1936, however, a law was enacted which made a $10.00 fee limitation applicable to all claims under statutes administered by the Veterans Administration (PL 844, 74th Congress; 38 USC 102).

(y) The laws administered by the Veterans Administration were consolidated in 1957 (PL 85-56), and recodified in 1958 (PL 85-857). The $10.00 fee limitation previously applicable to all VA benefit claims (except those involving litigated insurance matters), previously located in 38 U.S.C. 102, was recodified and placed in 38 USC 3404 where it is presently located.

Supreme Court, U. S.
F I L E D
AUG 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1974

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RONALD GENDRON,

APPELLANT,

-VS-

HONORABLE EDWARD H. LEVI, ETC.; ET AL.,

APPELLEES.

On Appeal From A United States District Court Of Three Judges For The Central District Of California

---

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to Rule 16(4) of the Rules of this Court, appellant respectfully prays that this Court deny appellees' motion to affirm the judgment of the district court. This Court should accord this case plenary consideration, with briefs on the merits and oral argument.

ARGUMENT

Appellees, in the Motion to Affirm, grudgingly admit that appellant's constitutional attack of 38 U.S.C. §3404(c) has never been considered by this Court (M.A., 3n.4), and that the statute precludes veterans from obtaining "the services of an attorney [who] would be of significant assistance" (M.A., 7n.9).

Despite these concessions, appellees urge that this Court summarily affirm the judgment of the three-judge district court on the following grounds: (1) "the constitutional validity of the current legislation, or predecessor statutes . . . has been sustained by every court that has considered the question" (M.A., 3); (2) "Congress has made provision for supplying, without charge, expert lay assistance to the veteran in preparing and presenting his claim . . . [from] certain veterans and patriotic organizations" (M.A., 4); and (3) the Government has a competing governmental

interest to appellant's which under the "balancing of interests" test outweighs appellant's need to be represented by counsel before the VA (M.A., 7).

Appellant believes that none of these arguments has merit and that this case--and the statute under attack--deserve the close examination of this Court.

A. There Is No Persuasive Precedent in Appellees' Favor

For "precedent" appellees rely primarily on a collection of Court of Appeals decisions which they claim decide the procedural due process issue in their favor. If the Court of Appeals decisions cited by appellees had seriously grappled with the problems this lawsuit raises, relative to defining property rights and balancing governmental and individual interests, this Court might be justified in declining plenary consideration of those problems. Such is not the case, however.

The two most recent decision, Bodey v. United States, 495 F.2d 1370 (4th Cir. 1974) and Holley v. United States, 477 F.2d 600 (6th Cir. 1973), aff'g 352 F.Supp. 175 (S.D.Ohio 1972), were decided without any opinion at all. The only other Court of Appeals ruling on this issue, Hoffmaster v. VA, 444 F.2d 192 (3d Cir. 1971), merely asserts the constitutionality of the $10 fee limitation without any analysis or justification. (Furthermore, the appellant in Hoffmaster appeared in the Court of Appeals in propria persona, and failed to file a brief. [Reporter's Transcript of Oct. 29, 1973, at 22.]).

There are currently other actions now pending in the Court of Appeals for the District of Columbia (Staub v. Johnson, No. 74-1504, argued March 11, 1975) and in the Northern District of Illinois (Doria v. Saxbe, No. 74 C 3629, motion to convene three-judge court granted on June 5, 1975, per McMillen, J.). Until this Court plenarily decides the relevant issues, important unsettled questions --such as when entitlement to a government benefit constitutes a "property right", and how far the government may go in barring lawyers from participating in benefit distribution schemes--will continue to occupy the already overburdened federal courts. This is true even though this Court could affirm the decision below, which would be "precedent", since, as this Court recently observed, summary affirmances "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974). The issues tendered here broadly affect many millions of veterans, and this Court is now the proper forum for the resolution of these questions of great public importance.

B. The Record Suggests That Lay-Representation Is Neither As "Expert" Nor "Skilled" As Appellees Baldly Assert

Appellees below characterize the quality of the available lay-representation as "expert" and "skilled" (M.A., 4 & 7). For this reason, appellees suggest, the fact that the statute in question deprives veterans of an attorney is not of great moment, since equally capable representation would be available. There is no basis, however, for appellees' characterization, and this Court should not be influenced by it here.

As presented as a Question on Appeal (No. 5), and as noted in appellant's Jurisdictional Statement (J.S. 9-10, D-1 - D-6), appellant contended and offered proof that the lay-representation supplied by veterans and patriotic organizations was often not competent, skilled or provided to veterans when requested. Appellant believes that the three-judge court erroneously refused the offer of proof, or competent evidence on this point. For the appellees now to assert "expertise" and "skill", without any reference to the record below, is highly unfair. Indeed, the record bristles with citation to congressional hearings testimony and a private study which minimize the value of lay-representation to deserving veteran claimants such as appellant herein. See, e.g., P. Starr, The Discarded Army: The Nader Report on Viet-Nam Veterans and the Veterans Administration (1973); Testimony of Prof. Frederick Davis, Hearing, Before the Subcommittee on Representation of Citizen Interests, of the Senate Committee on the Judiciary, 93d Cong., 1st Sess. 520 (1973).

At the least, should this Court determine that the fact that lay-representation is available forms a basis for upholding the constitutionality of the statute, then this Court should also hold that the quality of such representation is also fairly at issue. In such event, this Court should remand this appeal to the district court to accept evidence on this issue.

C. Governmental Interests Do Not Outweigh Individual Interests In This Case Or Similar Cases

Appellees assert that the federal government's interests in limiting to $10 the lawyer's fees in veterans disability proceedings are "to protect the public fisc and to assure that governmental benefits are received, without substantial depletion" by the intended beneficiaries (M.A., 4). Furthermore, they argue that in view of the availability of free lay-representation (discussed above) and the allegedly simple and "nonadversary" nature of many VA claims, veterans' interests in

receiving legal representation in administrative proceedings cannot overcome these government interests.

While these arguments have some superficial plausibility, they do not withstand scrutiny. A $10 fee limitation is such an irrational over-reaction to any need to protect the public treasury against claims motivated by a lawyer's hope of gain, that its existence cannot be justified on that basis. Administrative review of fee awards, or a percentage limitation can accomplish the commendable end of assuring that only valid claims be presented, and that the veteran will receive the lion's share of the benefits intended for him. The interest in preserving the full amount of benefits for veterans entitled to them is laudable; but it is hardly consolation to veterans erroneously denied benefits by the VA because they were not represented by lawyers.

Appellees' emphasis on the simplicity of most veterans' disability proceedings (once again baldly asserted, and without support in the record), the helpfulness of VA personnel, and the availability of free lay assistance, do not establish the dominance of this interest over a veteran's desire --or need--to retain counsel. First, as appellees must and do concede, not all disability claims are routine. The volume of regulations on the subject, the existence of disputed appeals (which oft-times

raise subtle and difficult questions of law), and the presence of lawyers on the VA's own staff indicate quite the contrary. Certainly appellant's dispute here over the "service-connectedness" of his disability is not a simple matter. (Indeed, the VA disputes that his psychiatric order exists, whether or not it is disabling if it does exist, and is of the type of psychiatric disorders which would entitle a veteran to benefits under applicable VA regulations.) Yet, the $10 fee limitation makes no distinctions between such simpler cases and the more complex ones.

Second, although VA regulations may provide for a "non-adversary" hearing, this Court has pierced such rhetoric in other administrative and quasi-judicial contexts. Cf. In re Gault, 387 U.S. 1 (1967). As Professor Robert Rabin has pointed out "[a]gencies making determinations of entitlement do not have a history, by and large, of playing the role of advocate for their client groups: witness the welfare bureaucracy and the Selective Service System." Rabin, Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis, 27 Stan. L.Rev. 905, 917n. 49 (1975). There are institutional constraints on VA decision-makers (such as internal audits that produce information used in promotions and demotions) that can affect the extent to which they will actively assist the veteran or his lay-repre-

sentative. See Mashaw, The Management Side of Due Process, 59 Cornell L.Rev. 772 (1974). Furthermore, the total absence of judicial review (under 38 U.S.C. § 211 [a]) removes any countervailing pressure on administrators to act vigorously on the claimant's behalf. Thus, the need for lawyers is not eliminated or reduced substantially by the explicitly non-adversary nature of the proceeding.

Third, and most important, is the simple fact that the availability of free lay assistance in no way supports the government's interest in discouraging legal representation by limiting attorney's fees to $10. It does exactly the opposite. For if free lay assistance is available, the lawyer must compete with an attractive alternative, and the veteran may choose. If the lawyer cannot justify his expense in terms of additional benefits, the veteran need not retain him. Thus, the government's desire that veterans receive maximum benefits would not be undermined by giving veterans the opportunity to retain counsel at a fee higher than $10. By contrast, where free lay assistance is unavailable, and the veteran's two alternatives are self-representation and hiring a lawyer, it is more incumbent on the state to limit overreaching by the lawyer (although, even then, a $10 limitation is wholly irrational and unnecessary). Even ignoring the weaknesses of the lay-representation system related to the claimant's lack of choice and the possible role conflicts experienced by representatives working daily and closely with the VA, the existence of that system does not strengthen appellees' position. It weakens it.

Finally, no drastic disruption of the VA's claims process would ensue if this Court established a meaningful right to retain counsel in such administrative proceedings. Lawyers are already permitted to represent veterans before the VA (in the highly unlikely event a veteran can find one to represent him for the $10 maximum fee). It is only that the restrictions placed on the access to lawyer representation are so severe, and irrational, as to preclude attorney representation as a practical matter. There simply are no governmental interests on appellees' side of the scale.

CONCLUSION

Appellant respectfully urges this Court to deny appellees' motion to affirm and to order plenary consideration herein.

Respectfully submitted,

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July 1975.

CERTIFICATE OF SERVICE

I, Fred Okrand, certify as follows:

I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and am one of the attorneys for appellant herein.

On July 31, 1975, I served the within BRIEF IN OPPOSITION TO MOTION TO AFFIRM on appellees herein by placing three copies thereof enclosed in a sealed envelope, with first class air mail postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Robert H. Bork, Solicitor General
Rex E. Lee, Assistant Attorney General
William Kanter and Robert S. Greenspan,
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I further certify that all parties required to be served have been served.

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